



Incorporation by Reference

Committee on Administration & Management

Proposed Recommendation | December 8-9, 2011

1 Incorporation by reference allows agencies to comply with the requirement of
2 publishing rules in the Federal Register to be codified in the Code of Federal Regulations (CFR)
3 by referring to material published elsewhere.¹ The practice is first and foremost intended to—
4 and in fact does—substantially reduce the volume of the CFR. But it also furthers important,
5 substantive regulatory policies, enabling agencies to draw on the expertise and resources of
6 private sector standard developers to serve the public interest. Incorporation by reference
7 allows agencies to give effect to a strong federal policy, embodied in the National Technology
8 Transfer and Advancement Act of 1995 and OMB Circular A-119, in favor of agency use of
9 voluntary consensus standards.² This federal policy benefits the public, private industry, and
10 standard developers.

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12 The Conference has conducted a study of agency experience with the practice of
13 incorporation by reference, including the use of voluntary consensus standards. The study
14 focused on three issues agencies frequently confront when incorporating by reference: (1)

¹ See 5 U.S.C. § 552(a)(1); 1 C.F.R. §§ 51.1-51.11.

² See National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 (1996); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (1998); see also Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1,357 (Jan. 5, 1979) (recommending agencies use voluntary consensus standards in health and safety regulation). Voluntary consensus standards are created by private standard-development organizations that use a consensus-driven approach that ensures public participation and transparency.



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15 ensuring materials incorporated by reference are reasonably available to regulated and other
16 interested parties; (2) updating regulations that incorporate by reference; and (3) navigating
17 procedural requirements and resolving drafting difficulties when incorporating by reference.
18 Agencies have used a variety of approaches to address these issues within the constraints of
19 federal law and regulatory policy. This recommendation identifies and encourages those
20 approaches that have proven most successful.

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22 *Availability of Incorporated Materials.* Ensuring that regulated and other interested
23 parties have reasonable access to incorporated materials is perhaps the greatest challenge
24 agencies face when incorporating by reference. When the relevant material is copyrighted—as
25 is often the case with voluntary consensus standards—access issues are particularly
26 problematic. There is some ambiguity in current law regarding the continuing scope of
27 copyright protection for materials incorporated into regulations,³ as well as the question of
28 what uses of such materials might constitute “fair use” under section 107 of the Copyright Act.⁴
29 Efforts to increase transparency of incorporated materials may conflict with copyright law and
30 with federal policies recognizing the significant value of the public-private partnership in
31 standards.

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³ See, e.g., *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc). This case held that where local law had incorporated a privately developed building code, a private party’s posting of the resulting local law did not violate copyright, because the law was in the public domain. *Id.* at 793, 802. However, the court distinguished cases concerning the incorporation by reference of materials “created by private groups for reasons other than incorporation into law,” *id.* at 805, leaving some uncertainty as to the rule applicable to many voluntary consensus standards.

⁴ See, e.g., OFFICE OF LEGAL COUNSEL, DEP’T OF JUSTICE, *Whether and under what Circumstances Government Reproduction of Copyrighted Materials Is a Noninfringing “Fair Use” under Section 107 of the Copyright Act of 1976* (1999). This opinion noted that there is no per se rule under which government reproduction of copyrighted materials for governmental use invariably qualifies as fair use, but also noted that such reproduction would in many contexts constitute a noninfringing fair use. The opinion focused on government reproduction for internal government use and did not consider government republication of copyrighted materials.



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33 This recommendation does not attempt to resolve the questions of copyright law
34 applicable to materials incorporated by reference into federal regulations. Rather, the
35 recommendation encourages agencies to take steps to promote the availability of incorporated
36 materials within the framework of existing law. This effort is consistent with the National
37 Science and Technology Council’s acknowledgment that “the text of standards and associated
38 documents should be available to all interested parties on a reasonable basis, which may
39 include monetary compensation where appropriate.”⁵ The Conference’s research reveals that
40 some agencies have successfully worked with copyright holders to further the goals of both
41 transparency and public-private collaboration. Some agencies have, for example, secured
42 permission to make a read-only copy of incorporated material available in the agency’s public,
43 electronic docket during the pendency of the rulemaking proceeding relating to the material.
44 In other cases, the copyright holder has made the material publicly available in read-only form
45 on its own website. This recommendation encourages agencies to take these or other steps to
46 promote availability of incorporated materials, such as encouraging copyright holders to make
47 incorporated materials available in libraries.

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49 *Updating Regulations.* Updating regulations that incorporate by reference is another
50 challenge. Agencies are legally required to identify the specific version of material incorporated
51 by reference and are prohibited from incorporating material dynamically.⁶ When an updated
52 version of the incorporated material becomes available, the regulation must be updated if the
53 agency wants the regulation to incorporate the new version. This can require the agency to
54 engage in notice-and-comment rulemaking, which entails a significant investment of agency
55 resources. For agencies that are statutorily required to provide rulemaking procedures beyond

⁵ See SUBCOMMITTEE ON STANDARDS, NAT’L SCI. & TECH. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* 11 (Oct. 10, 2011).

⁶ See 1 C.F.R. § 51.1(f); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES ¶ 6(j) (1998).



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56 those required by Section 553 of the Administrative Procedure Act (APA), updating may prove
57 to be an insurmountable challenge. Nonetheless, agencies have successfully used a variety of
58 techniques to reduce the time and cost constraints of updating rules. Some agencies have used
59 enforcement discretion or “equivalency determinations” to avoid penalizing parties that comply
60 with an updated version of an incorporated standard that the agency finds to be equivalent to
61 or superior to the version still incorporated in the agency’s regulations. Other agencies have
62 reduced the burden of updating by tracking forthcoming revisions through participation in
63 standard-development activities.⁷ Still others have used direct final rulemaking to reduce the
64 costs of updating an incorporating regulation. The recommendation encourages these time
65 and cost-saving techniques. A statutory solution may be unavoidable when these techniques
66 have proven insufficient.

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68 *Complying with Procedural Requirements.* Finally, successfully incorporating by
69 reference requires agencies to comply with detailed procedures and carefully draft regulations.
70 The Office of the Federal Register (OFR) is statutorily charged with approving all incorporations
71 by reference, and has issued regulations and guidance establishing policies and procedures for
72 doing so. Procedural errors can delay the publication of rules that incorporate by reference.
73 Poor drafting may create confusion among regulated parties or produce a rule that does not
74 fulfill the agency’s regulatory purpose. The Conference’s research revealed that agencies
75 reporting few or no problems in complying with OFR’s incorporation by reference procedures
76 followed identifiable best practices that other agencies should consider adopting.

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⁷ See SUBCOMMITTEE ON STANDARDS, NAT’L SCI. & TECH. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* (Oct. 10, 2011).



RECOMMENDATION

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79 **Ensuring Incorporated Materials are Reasonably Available**

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81 1. Agencies considering incorporating material by reference should ensure that the
82 material will be reasonably available both to the regulated community and other interested
83 parties.

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85 2. If an agency incorporates by reference material that is not copyrighted or subject to
86 other legal protection, the agency should make that material available electronically in a
87 location where interested parties will be able to find it easily.

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89 3. When an agency is considering incorporating by reference into a regulation copyrighted
90 material, the agency should work with the copyright holder to ensure the material will be
91 reasonably available to regulated and other interested parties both during rulemaking and
92 following promulgation.

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94 (a) If more than one standard is available to meet the agency's need, it should consider
95 restrictions on availability as one factor in determining which standard to use.

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97 (b) Agencies should request holders of copyright in incorporated material to consent to its
98 free publication, and, if such consent is given, make the material available as in
99 paragraph (2), above.

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101 (c) If copyright holders do not consent to free publication of incorporated materials,
102 agencies should work with them and, through the use of technological solutions, low-



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103 cost publication, or other appropriate means, promote the availability of the materials
104 while respecting the copyright holder's interest in protecting its intellectual property.

105 4. In deciding whether to incorporate a particular copyrighted material by reference, and
106 in working with a copyright holder to ensure the material is reasonably available, an agency
107 should consider:

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109 (a) The stage of the regulatory proceedings, because access may be required during
110 rulemaking to make public participation in the rulemaking process effective;

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112 (b) The need for public disclosure to achieve agency policy or to subject the effectiveness of
113 agency programs to public scrutiny;

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115 (c) The cost to obtain a copy of the material, including the cumulative cost to obtain
116 incorporated material that itself incorporates further materials; and

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118 (d) The identity of parties that must have access to the incorporated material, and their
119 ability to bear the costs of accessing such materials.

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121 5. When considering incorporating by reference highly technical material, agencies should
122 include in the notice of proposed rulemaking an explanation of the material and how its
123 incorporation by reference will further the agency's regulatory purpose.

124 125 **Updating Incorporations by Reference**

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127 6. Agencies should periodically review regulations and make technical amendments (i.e.,
128 nonsubstantive amendments that do not require notice and comment) as necessary to ensure



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129 that complete and accurate access information⁸ is included in all regulations that incorporate
130 by reference. Agencies should ensure that they are notified of all changes to access
131 information.

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133 7. Agencies that regularly incorporate private standards should adopt internal procedures
134 to ensure good communication of emerging revisions to those within the agency charged with
135 making policy decisions and writing rules. Agencies should consider participating in standard-
136 setting activities in order to maintain awareness of emerging revisions.⁹

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138 8. Agencies should not address updating challenges by confining incorporations by
139 reference to non-binding guidance documents. If an agency intends to make compliance with
140 extrinsic material mandatory, it should incorporate that material by reference in a legislative
141 rule.

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143 9. In the interests of fairness and transparency, agencies should publish regulations or
144 guidance establishing the policies and principles governing equivalency determinations or
145 guiding this use of enforcement discretion in situations where they have been unable to update
146 incorporations by reference in regulations.

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148 10. For non-controversial substantive updates to incorporations by reference in regulations,
149 agencies authorized to regulate under Section 553 of the APA should use direct final
150 rulemaking.¹⁰

⁸ "Access information" informs the public of where it can inspect or obtain a copy of the incorporated material. See 1 C.F.R. § 51.9(b)(4); Nat'l Archives & Records Admin., *Federal Register Document Drafting Handbook* § 6.4 (Jan. 2011).

⁹ See Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1,357 (Jan. 5, 1979).

¹⁰ See Administrative Conference of the United States, Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,108, 43,112 (June 15, 1995).



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152 11. Congress should consider authorizing agencies to use streamlined procedures to update
153 incorporations by reference. An appropriate statutory solution would:

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155 (a) Provide for interested parties to file a petition for rulemaking that would notify the
156 agency of a revised standard, identify the changes from the incorporated version of the
157 standard, and explain why updating would be consistent with the agency's regulatory
158 purpose, including providing information on the costs or benefits of incorporating the
159 revised standard;

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161 (b) Vest the agency with authority to determine whether to act on the petition; and

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163 (c) Authorize agencies to grant the petition by issuing a final rule, without regard to
164 otherwise applicable rulemaking requirements, provided that the agency first:

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166 (1) Publishes a notice of the petition in the Federal Register, indicates in that notice
167 what regulations the requested update would affect, and provides for public
168 comment on the petition; and

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170 (2) Finds that updating regulations as requested in the petition is beneficial and
171 consistent with the regulatory purpose of the relevant regulation.

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173 **Navigating Procedural Requirements**

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175 12. Each agency that incorporates by reference should task its Office of the Federal Register
176 (OFR) liaison or another employee with being a point of contact with OFR and maintaining a
177 close working relationship between the two agencies. Such agencies should take advantage of



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178 OFR's training opportunities and follow the procedures of its Document Drafting Handbook
179 (DDH).

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181 13. When considering a regulation that would incorporate by reference, agencies should
182 ensure legal counsel or other experts in OFR regulations, DDH, and policy are involved early in
183 the rulemaking process to reduce the potential for delays in publishing rules. Agencies
184 considering incorporating by reference should reach out to OFR staff early in the rulemaking
185 process.

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187 14. OFR should continue and expand upon its efforts to make the process easier through an
188 electronic submission and review process for incorporation by reference requests.

189

190 **Improving Drafting Techniques**

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192 15. Agencies should ensure that incorporations by reference support, rather than detract
193 from, the usefulness and readability of the Code of Federal Regulations. Incorporated material
194 may provide detail, but a regulation should, by itself, make the basic concept of the rule
195 understandable without the need for the reader to refer to the incorporated material.

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197 16. Agencies should review the language used in material they are considering
198 incorporating by reference to determine whether it is mandatory or merely advisory or
199 voluntary. Agencies promulgating mandatory regulations should take care to specify in the
200 regulation which portions of the material will be considered mandatory after incorporation.

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202 17. When an agency incorporates a document that references a second (or greater) tier
203 document, the agency should acknowledge and explain the substantive legal effect of the
204 secondarily referenced document(s). OFR should consider amending the DDH to call attention
205 to the potential issue of secondary references. If an agency wants to make a second tier



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206 document mandatory, it should ensure that such material is reasonably available both to the
207 regulated community and other interested parties.

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209 18. Agencies should be alert to the possibility that some part of their regulations may
210 inadvertently conflict with a requirement incorporated by reference. When drafting
211 regulations, agencies should avoid or resolve any such conflicts.